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No. 05-11304

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IN THE

Supreme Court of the United States

LAROYCE LATHAIR SMITH,
Petitioner,

v.

STATE OF TEXAS,
Respondent

On Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTIONS PRESENTED

1. In *Smith v Texas*, 543 U.S. 37 (2004), this Court summarily reversed the Texas Court of Criminal Appeals and found constitutional error under *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), and *Penry v Johnson*, 532 U.S. 782 (2001) (*Penry II*). Is it consistent with this Court's remand in this case for the Texas Court of Criminal Appeals to deem the error in Petitioner's case harmless based on its view that jurors were in fact able to give adequate consideration and effect to his mitigating evidence notwithstanding this Court's conclusion to the contrary?

2 Can the Texas Court of Criminal Appeals, based on a procedural determination that it declined to adopt in its original decision which was summarily reversed by this Court, impose on remand a heightened standard of harm ("egregious harm") to avoid rectifying the constitutional violation found by this Court?

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS

The caption of the case contains the names of all parties to the proceedings in the lower courts and here.

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The opinion of the Texas Court of Criminal Appeals is reported as *Ex parte LaRoyce Lathair Smith*, 185 S.W. 3d 455 (Tex. Crim. App. 2006). JA: 269.

JURISDICTION

On March 1, 2006, the Texas Court of Criminal Appeals issued its opinion denying Smith's application for a writ of habeas corpus. *Ex parte Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006). No petition for rehearing was filed.

The Court has jurisdiction to review the decision of the Texas Court of Criminal Appeals pursuant to 28 U.S.C. § 1257(a) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the Eighth Amendment to the Constitution of the United States, which provides in relevant part, "nor [shall] cruel and unusual punishments [be] inflicted," and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Course of Proceedings

This Court summarily reversed the Texas Court of Criminal Appeals ("CCA") on the merits of this case in *Smith v Texas*, 543 U.S. 37 (2004). JA: 225. The matter is again before this Court after the CCA denied relief on remand.

LaRoyce Smith was convicted of capital murder and sentenced to death in Dallas County, Texas, in June 1991. The CCA affirmed his conviction and sentence in June 1994. *Smith v. State*, No. 71,333, slip op. (Tex. Crim. App. June 22, 1994), *cert denied*, 514 U.S. 1112 (1995). JA: 135. LaRoyce then sought habeas corpus relief in the state courts. His first application for state habeas relief was twice dismissed as untimely. *See Ex parte Smith*, 1998 Tex. Crim. App. WL

210613; *Ex parte Smith*, 977 S.W.2d 610 (Tex. Crim. App. 1998). The CCA subsequently authorized the filing of a second habeas application, which was filed in March 2000. On April 5, 2001, the state trial court recommended that the application be denied, and the CCA adopted that recommendation in *Ex parte Smith*, 132 S.W. 3d 407 (Tex. Crim. App. 2004). JA: 177. Although four judges of the CCA wrote separately to express their view that the application should have been denied on state procedural grounds, the majority declined to do so and decided the case on its federal constitutional merits. This Court summarily reversed the decision of the CCA. *Smith v. Texas*, 543 U.S. 37 (2004). JA: 225. On remand, the CCA again denied state habeas relief. *Ex parte Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006). JA: 269. It is that opinion that is now before this Court.

B. Facts Material to the Issues Presented

1. The Guilt Phase

This Court summarized the relevant facts of the crime as follows:

> In 1991, petitioner was convicted of brutally murdering one of his former co-workers at a Taco Bell in Dallas County. The victim and one of her co-workers were closing down the restaurant when petitioner and several friends asked to be let in to use the telephone. The two employees recognized petitioner and let him in. Petitioner then told his former co-workers to leave because he wanted to rob the restaurant. When they did not leave, petitioner killed one co-worker by pistol-whipping her and shooting her in the back. Petitioner also threatened, but did not harm, his other former co-worker before exiting with his friends. The jury found petitioner guilty of capital murder beyond a reasonable doubt.

543 U.S. at 38; JA: 225.

Critical mitigating evidence concerning Smith's mental deficiencies and difficult family background was introduced in the guilt phase of trial. Johnnie Mae Smith, LaRoyce

Smith's mother, testified that he was a slow learner in school and underwent a great deal of testing. JA: 52. He failed first grade and was in special education programs throughout elementary and middle school. *Id.* By the age of eighteen, LaRoyce had reached only the ninth grade, JA: 60, and he was still in the ninth grade when he turned nineteen. The crime was committed when LaRoyce was nineteen years old. JA: 53.

Johnnie Mae Smith and LaRoyce also testified about LaRoyce's father, Leroy Smith. Leroy Smith had been to prison for robbery. JA: 49-50. He was involved in a motorcycle gang, caroused with other women, and abused alcohol and drugs, especially crack cocaine. JA: 55. Leroy Smith repeatedly stole from his family to support his drug habit, JA: 56-57, which greatly disturbed all of the members of the family, including LaRoyce. JA: 58. At one point, when Leroy Smith sought to take a car from Johnnie Mae Smith and LaRoyce attempted to stop him, Leroy threatened LaRoyce with a butcher knife. JA: 61-62.

During his guilt-phase closing argument, defense counsel relied upon the evidence of LaRoyce's reduced mental capabilities to appeal to the jury's sense of comparative culpability, arguing that LaRoyce was less responsible than his co-defendant Kevin Shaw:

> You know, when you look at all the evidence and compare the two, they tell you LaRoyce is calling all the shots. Yeah, right. Let's look at it. Who's been to college? Remember Kevin? Kevin got kicked out of El Centro for having a gun, they said. LaRoyce has been in special ed since he started school. LaRoyce is the one who flunks first grade after he's been in Head Start since he was three years old. LaRoyce is 19 years old and he's in the ninth grade. Yeah, he's the brains.

JA: 66.

2. The Punishment Phase

The defense offered additional evidence of LaRoyce's cognitive impairments and difficult background in the penalty phase of the trial. Alberta Pingle, records coordinator for the special education department for the Dallas Independent School District ("DISD"), testified that LaRoyce had been identified at the earliest stages of his schooling as a slow learner with learning disabilities and speech handicaps. JA: 75-79. Testing performed by the school district indicated that LaRoyce's verbal IQ was 75 and full scale IQ was 78. JA: 85. A report prepared by Richard Adams, the director of health services for DISD, concluded on the basis of a physical exam and LaRoyce's school records that LaRoyce's learning problems were possibly organic in nature. JA: 81.

During Ms. Pingle's testimony, the defense introduced extensive school records that documented LaRoyce's academic and intellectual deficits from the time he entered school. A progress report issued less than two weeks before LaRoyce's seventh birthday reflects that he had not yet "learned all letters" and did not know his address or birthdate. JA II: 1. Despite his regular attendance, the report indicates "performance nil—progress nil." JA II: 1. At age ten, LaRoyce was reading somewhere between the first-and second-grade level, JA II: 18, and had a "3 year 6 month deficit as compared to chronological age in the area of receptive vocabulary skills." JA II: 27. Ms. Pingle, reading from the report documenting LaRoyce's academic progress at age ten, stated that "[h]e is slow and has difficulty remembering what he has learned." JA: 77. A school committee certified that LaRoyce's placement in special education was based on something other than deficiencies relating to "a different cultural lifestyle" or "not having had educational opportunities" or "not having achieved from [sic] previous educational experiences." JA II: 34. Ms. Pingle testified that school assessments documented LaRoyce's continuing need for special education at ages

eleven, twelve, and thirteen. JA: 78-85. One month before his fourteenth birthday, LaRoyce was still reading at the second-grade level. JA II: 58. Ms. Pingle also testified about LaRoyce's failing grades in eighth grade, JA: 86-87, and his failing grades in all three sections of the state's minimal skills test in ninth grade, JA: 88; JA II: 56, which caused LaRoyce to remain in the ninth grade through age nineteen.

Various family and community members confirmed the turbulence of LaRoyce's home life. Reverend Samuel Nicks, LaRoyce's pastor, testified that he was aware that LaRoyce's father had stolen from his family to support his drug habit, JA: 69, and that such behavior has an especially devastating impact on adolescent children. JA: 69. Dorothy Faye Ellis, a good friend of the family, testified that LaRoyce's family situation, especially the economic hardship wrought by his father's thefts, affected him greatly. JA: 104.

3. The Sentencing Instructions

The special issues on deliberateness and future dangerousness that were given to LaRoyce's jury were the same as those at issue in *Penry v Lynaugh*, 492 U.S. 302 (1989) *(Penry I)*:

> 1. Was the conduct of the defendant that caused the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result?
>
> 2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?[1]

Affirmative answers to both questions required imposition of the death sentence.

The jurors at LaRoyce's trial were also provided with a nullification instruction that they could disregard the content of the special issues if they believed that mitigating evidence

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[1] See Tex Code Crim Proc Art 37 071 (Vernon's ed 1989), which was the capital sentencing statute in effect at the time of LaRoyce's trial

—including evidence with "no relationship to any of the Special Issues"—led them to conclude "that the death penalty should not be imposed." *See* JA: 107.

Prior to trial, defense counsel filed three motions articulating the problems with the Texas sentencing scheme in the wake of *Penry I*. JA: 7-19. In the Motion to Reveal Mitigation Charge, counsel advised the Court that he would be offering evidence in mitigation "which has relevance beyond the parameters of the special issues." Counsel asked for guidance on what mitigation instructions the Court would be offering, so that he could proceed accordingly when exercising his peremptory strikes. JA: 18. In the two other motions, defense counsel objected to the special issue scheme on the grounds that it did not afford adequate consideration of LaRoyce's mitigating evidence, and that state law precluded supplementing the special issues with an unauthorized mitigation charge.[2] The trial court acknowledged LaRoyce's objec-

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[2] In the Motion to Declare Tex. Code Crim Proc. Ann. Art. 37.071 Unconstitutional, defense counsel argued:

> The Defendant further maintains that TEX CODE CRIM PROC ANN Art 37 071 is unconstitutional because it does not provide for the introduction and subsequent use by the jury of mitigating evidence which is not relevant or material to the special issues. There is no provision in Texas for the jury to decide the appropriateness of the death penalty taking into consideration the personal moral culpability of the Defendant balanced by mitigating evidence which is not directly or circumstantially probative in answering the special issues There is no provision in the current statutory scheme for the jury to render its verdict that the death penalty should not be inflicted because of mitigating evidence of this type.

JA: 13

In the Motion to Declare Tex Code Crim Proc. Ann Art. 37.071 Unconstitutional as Applied, defense counsel argued that the defect in the Texas special issue scheme could not be cured by the submission of an ad hoc supplemental instruction not authorized by the Texas Legislature JA: 9-10. In both of these motions, counsel repeatedly cited *Penry*

tions to the charge and denied both motions. JA: 21.[3]

4. Voir Dire

On voir dire, the prosecutors repeatedly asked prospective jurors, including jurors who ultimately served, whether they could answer the special issues honestly and without attempting to achieve a particular sentence—life or death. For example, during the voir dire of Teresa Lane, Juror No. 7, the prosecutor explained:

> [W]e're looking for a juror that's not leaning one way or the other, that they're going to look at these questions and answer them regardless of what that means. If the facts indicate any of these questions should be answered yes and that means he dies, well, that's just what the facts call for and that's the way you vote.

JA: 37. Similarly, in the voir dire of Lynn Bartholomew, Juror No. 10, the prosecutor asked: "[W]hat we have to have are jurors that will tell us despite . . . wanting a specific result, I will answer the questions based on the facts regardless of what the [sic] means, live or die. Do you think you can do that?" JA: 42.

At the same time, both defense counsel and the prosecutors also asked jurors about their willingness to follow the nullification charge. Of the twelve jurors who served, only two had an extended colloquy on voir dire about the meaning and operation of the nullification instruction. Each of these colloquies revealed either dismay or confusion on the part of the jurors involved.

The first exchange involved Gary Powell, the first juror seated. Mr. Powell, an attorney, expressed surprise and discomfort at the nullification instruction's invitation to answer

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[3] In addressing the Motion to Reveal Mitigation Charge, the trial judge asked counsel whether he wanted to word the mitigation charge differently. Trial counsel declined in light of his previously articulated position that the legislature must authorize departures from the statutory special issue language. JA 21

the special issues untruthfully, describing the prospect of nullifying as "a real tough choice" that ran contrary to his "legal sensibilities." JA: 25-26. Both defense counsel and the judge commiserated with Mr. Powell. The attorney acknowledged that the nullification instruction was "bizarre," and the judge expressed the "hop[e]" that the legislature would soon—as Mr. Powell put it—"add a fourth element . . . to catch those mitigating circumstances." JA: 26-27.

The second extended colloquy involved juror Dottie Wright, Juror No. 6. In the voir dire, the prosecutor explained to her that the jury would never directly address the question of whether the defendant should live or die:

> Okay. Let me tell you a little bit about how the trial works. You are not actually asked to give somebody life or death; what will happen is you'll be asked to answer a couple of questions. The way you answer those questions dictates whether or not he lives or dies. . . . You won't go back and decide, well,—you know, ask yourself, 'Should he live or die?' What you'd be doing is asking yourself to answer these questions.

JA: 30. Later in her voir dire, when asked if she could change one of her answers to the special issues "in order to give true effect and meaning to your heartfelt need," Ms. Wright at first emphatically stated that she would not do so: "No. If it's proven to me, my answer is going to stay strong . . . ." JA: 32. In response to further questions, Ms. Wright then indicated she would change her truthful answers to the special issues only if the defendant had proved his innocence. JA: 32. Still further questioning elicited yet another refusal to abandon truthful answers that resulted in a death sentence: "It's just like I say, if I've really been proven what it is, I feel it need [sic] to be a death sentence. . . ." JA: 33. Finally, after the nullification mechanism was explained yet again, Ms. Wright said she could "do it." JA: 34.

The voir dire exchanges regarding the nullification charge with the other jurors selected to serve were comparatively

slight. Either the prosecutor or defense counsel (or sometimes both) offered a definition of mitigating evidence, explained that if the jurors believed the defendant should be sentenced to life, they should go back and answer one of the special issues in the negative—even if they felt that the honest answer required an affirmative response—and asked if they would be comfortable doing so. In response, the selected jurors typically gave one word responses of "yes," "no," or "uh-huh" indicating their willingness to change their answers.[4]

5. Closing Arguments

During the punishment-phase closing arguments, the prosecutor emphasized the jurors' obligation to answer the special issues truthfully. Reminding them of voir dire, the prosecutor insisted on honesty:

> Now, when we talked to you on voir dire, we talked to you about—and we spent a lot of time talking to you to determine whether or not you could follow the law. You told us two very important things when we talked to you. First of all, you told us that in the appropriate case that you could give the death penalty. Secondly, you said, 'Mr. Nancarrow, Ms. McDaniel, if you prove to me that the answers to those special issues should be yes, then I can answer them yes.' If you wavered, if you hesitated one minute on that, then I guarantee you, you weren't going to be on this jury. We believed you then, and we believe you now.

JA: 111.

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[4] *See, e g* , SF 8 112-13, 133-34 (voir dire of Ava Meyer, Juror No 2), SF 10 118, 136-37 (voir dire of Donna Coulter, Juror No 3), SF 11 58-60 (voir dire of Carol Keyte, Juror No 4), SF 11 162-65 (voir dire of Thomas Morrison, Juror No 5); SF 15 31-32 (voir dire of Theresa Lane, Juror No 7), SF 16 18-19 (voir dire of Steven Dillow, Juror No 8), SF 16 70-71 (voir dire of Janis Zeigler, Juror No 9), JA 41 (voir dire of Lynn Bartholomew, Juror No 10), SF 21 53-54 (voir dire of Mary Foote, Juror No 11), SF 25 105-07 (voir dire of Derek Fisher, Juror No 12)

The prosecutor also emphasized that jurors had promised on voir dire that they could answer the dangerousness special issue affirmatively based on the criminal offense itself, JA: 114 ("You said you could answer that question number two yes just based on one act alone"). Thus, the prosecutor urged that the defendant's conduct during the crime "dictated" a "yes" answer to the second special issue. JA: 114.

Defense counsel responded by trying to rebut the State's evidence of deliberateness and dangerousness. JA: 117-118 (responding to State's case on deliberateness); JA: 118-119 (responding to State's case on dangerousness). The defense then separately emphasized the significance of the mitigating evidence it had presented. First, counsel reminded the jury of LaRoyce's placement in special education and his low intelligence, emphasizing his IQ of 78: "He is eight points from being mentally retarded." JA: 120. Defense counsel then stressed the effect of LaRoyce's "family problems," especially his father's crack habit and thefts from the family: "You know that has an impact on someone." JA: 121. Defense counsel urged the jurors to understand LaRoyce's mitigating evidence not as an attempt to shift blame to others, but rather as "something that happened and it's something that you should consider because it's not black and white." *Id*

6. The Verdict Form

The jury verdict form did not include any mention of mitigating evidence or of the jurors' ability to change their answers on the basis of such evidence, and asked only for answers to the two special issues. *See* JA: 123-124. The jury answered both issues affirmatively, and LaRoyce was sentenced to death.

SUMMARY OF THE ARGUMENT

This case comes to this Court for a second time. In its previous decision, this Court held that the sentencing instructions in LaRoyce's case did not provide a constitutionally adequate vehicle to consider LaRoyce's mitigating evidence, which included evidence of his 78 IQ score, his potentially organic learning disabilities and speech handicaps, and his troubled family background. 543 U.S. at 47-48; 234-236. This Court found error under *Penry I*, holding that the inquiries of the Texas special issue scheme "had little, if anything, to do with the mitigation evidence petitioner presented" 543 U.S. at 48, JA: 235. This Court likewise found error under *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), holding that the nullification instruction in this case, which permitted jurors to alter their truthful responses to the special issues to achieve a life sentence, was not a constitutionally adequate means of guaranteeing juror consideration of LaRoyce's mitigating evidence. 543 U.S. at 47; JA: 233. In reaching this conclusion, this Court specifically addressed and rejected the argument that the clarity of the nullification instruction in LaRoyce's case ensured that jurors would in fact give adequate consideration to LaRoyce's mitigating evidence, declaring that, "[t]o the contrary, the mandatory language in the charge could possibly have intensified the dilemma faced by ethical jurors." 543 U.S. at 47-48; JA: 235

On remand, the CCA deemed the constitutional error found by this Court harmless on the ground that jurors were in fact able to give adequate consideration to LaRoyce's "extensive mitigating evidence" via the special issues and the nullification instruction. 185 S.W.3d at 471-72; JA: 296-297 ("Applicant fails to provide any persuasive argument that the jury was unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take into account the specific evidence of his relatively low IQ test at the age of thirteen, his participation in a special education

reading program and speech therapy, or his troubled family background.").

In reaching this conclusion, the CCA relied on the very same arguments rejected by this Court when it found the special issues in combination with the nullification instruction inadequate in its summary reversal.

First, the CCA professed uncertainty about whether this Court found the special issues inadequate for the consideration of LaRoyce's mitigating evidence, despite this Court's forceful declaration that the inquiries of the deliberateness and dangerousness special issues, as in *Penry II*, "had little, if anything, to do with the mitigation evidence petitioner presented." 543 U.S. at 48; JA: 235. Second, and more fundamentally, the CCA insisted that the nullification instruction cured the *Penry I* problem because of the clarity of the instruction in the context of LaRoyce's trial, notwithstanding this Court's unequivocal holding that the "clearer instruction" did not resolve the *Penry II* problem and "could possibly have intensified" the jurors' ethical dilemma. *Id.* Third, the CCA rejected this Court's determination that "the nullification instruction may have been more confusing for the jury to implement in practice than the state court assumed." *Id.* at n.5. In concluding that jurors would have implemented the nullification instruction without problem or confusion, the CCA ignored this Court's specific conclusions that the prosecutor's closing arguments exacerbated the moral dilemma posed by the nullification instruction and that the bare verdict form—which made no mention of mitigation evidence—undermined the likelihood that jurors would have viewed themselves free to ignore the plain language of the special issues. Moreover, the purportedly new consideration that led the CCA to conclude that jurors would have followed the nullification directive—that "neither the jurors who served, nor the parties or trial judge noted a potential dilemma," 185 S.W.3d at 468; JA: 291—is contrary to the record in this case,

in which a seated juror, the trial judge, and defense counsel all recognized, discussed, and lamented the precise ethical dilemma highlighted by this Court.

The CCA's harmless error ruling is nothing more than a disagreement with this Court's federal constitutional conclusion that the special issues in combination with the nullification instruction did not provide an adequate means for jurors to give effect to LaRoyce's mitigating evidence. Consequently, this case is not about the meaning of *Penry I*, the meaning of *Penry II*, or the appropriate scope of state harmless error law. This case is about whether a state court's decision to revisit this Court's constitutional judgment and to reject specific conclusions in this Court's opinion can be squared with this Court's remand to the state court "for further proceedings not inconsistent with this opinion." The fact that the state court's harm analysis wholly depended on a rejection of this Court's merits analysis requires reversal of the decision below.

In addition, a separate basis for reversal can be found in the state court's insistence that petitioner show "egregious harm" on remand as a predicate for relief. The CCA's decision to require "egregious harm" violates federal law in numerous respects.

First, the CCA's basis for requiring such harm—LaRoyce's purported failure to make an adequate contemporaneous objection to the charge at trial—was adopted by the CCA only in response to this Court's review and reversal of the CCA's erroneous decision of LaRoyce's federal constitutional claim on the merits. Although four judges on the CCA had claimed that LaRoyce's objection to the instruction was inadequate in their first decision, the majority of the CCA refused to embrace such a finding and addressed LaRoyce's claim on the merits. The CCA's decision to revisit the adequacy of LaRoyce's contemporaneous objection on remand punishes his success in this Court and improperly attempts to manipulate this Court's appellate jurisdiction.

Second, trial counsel plainly and clearly objected to the failure of the special issues to allow constitutionally adequate consideration of LaRoyce's mitigation. The CCA's finding of insufficient objection is premised on a misunderstanding of the applicable federal right. Moreover, if Texas law precludes consideration of LaRoyce's claim in these circumstances, such a hyper-technical preservation requirement for claims of constitutional error independently violates federal law.

The CCA acknowledged that LaRoyce "may have suffered 'some' actual harm" and therefore would be entitled to relief absent the application of its "egregious harm" standard. Accordingly, because the CCA's application of the egregious harm standard itself violates federal law, the CCA decision cannot stand for reasons independent of the CCA's unacceptable rejection of the merits of this Court's initial decision in this case.

The most appropriate course for this Court is to recognize that its prior decision together with the CCA's own findings mandate relief for LaRoyce's federal constitutional claim. The CCA's opinion recognized and acknowledged that LaRoyce's mitigating evidence was "extensive." 185 S.W.3d at 471; JA: 296. This Court's own opinion stated that "[t]here is no question that a jury might well have considered petitioner's IQ scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death." 543 U.S. at 44; JA: 231-232. If the CCA had implemented this Court's holding that the sentencing scheme precluded constitutionally adequate consideration of LaRoyce's mitigating evidence, it would have been compelled to find the constitutional violation harmful. Moreover, if the CCA had not switched its position regarding the adequacy of LaRoyce's objections to the special issue scheme, it would have granted relief in light of its acknowledgement that LaRoyce suffered at least "some harm." Even without this acknowledgement, it is indisputable that a properly instructed jury might well have concluded that a nineteen-year-old

ninth-grader with a 78 IQ, a long history of special education, and a troubled family background, should be spared the death penalty. This Court should accordingly remand with instructions to grant relief on LaRoyce's *Penry* claim.

ARGUMENT

I. THE STATE COURT'S HARMLESS ERROR ANALYSIS REJECTED THE MERITS OF THIS COURT'S SUMMARY REVERSAL AND THEREFORE VIOLATED THIS COURT'S MANDATE.

The crux of the state court's opinion in this case is that jurors would have believed themselves empowered to falsify their truthful responses to the special issues and thus that LaRoyce failed to show "that the jury was unable to consider the totality of his extensive mitigating evidence." 185 S.W.3d at 471; JA: 296. In support of its conclusion, the CCA emphasized the purported clarity of the explanations of the nullification instruction on voir dire, the purported absence of prosecutorial argument limiting jurors' consideration of mitigating evidence, and the sheer weight and effective presentation of LaRoyce's mitigating evidence.

This approach contradicts the holding of this Court in its summary reversal that the nullification instruction did not provide an effective means for jurors to give effect to LaRoyce's mitigating evidence. It also contradicts two explicit components of this Court's analysis. First, this Court unequivocally rejected the state court conclusion, repeated in the decision below, that the problem of requiring jurors to lie to give effect to mitigating evidence is solved by clearly informing them of their power to do so. Second, this Court, citing various aspects of LaRoyce's trial—including prosecutorial argument and the content of the verdict form—likewise rejected the CCA's conclusion that the nullification instruction would not, on the facts of this case, have confused jurors as they decided whether and how to give effect to mitigating evidence.

The CCA decision, by reasserting the very points this Court previously rejected and ignoring this Court's legal conclusions, has violated the Court's mandate. Moreover, the CCA's claim that the *Penry* error in this case was cured by the nullification instruction in part *because of* the power and extent of LaRoyce's mitigating evidence gets it exactly backwards. Given this Court's firm holding that jurors lacked an adequate vehicle to consider LaRoyce's mitigating evidence, the CCA's acknowledgement of the extensive, compelling character of LaRoyce's mitigating evidence *confirms* rather than undermines the conclusion that the constitutional error in this case cannot be deemed harmless.

A. Each Part of the CCA's Harmless Error Analysis Repudiates or Ignores Specific Conclusions Reached by this Court in its Summary Reversal.

1. The CCA's reliance on the purportedly clear explanation of the nullification instruction on voir dire cannot be squared with this Court's decision. Moreover, the record in this case confirms this Court's concerns about the inefficacy of the nullification instruction.

In its prior decision denying habeas relief in this case, the CCA held that *Penry II* did not control the outcome because the jurors here would have clearly understood their power to answer the special issues untruthfully in order to give effect to mitigating evidence. 132 S.W.3d at 416; JA: 190 ("The 'nullification' instruction in this case was a sufficient vehicle to accord full weight to applicant's mitigation evidence."). One of the two concurring opinions particularly emphasized that "during voir dire, [the nullification] instruction and how it operated was very carefully explained to each venire-member who sat on defendant's jury" and that "these venire-members stated that they understood it." *Id.* at 420; JA: 199. (Hervey, J., joined by Keasler, J., concurring). The concurring opinion offered extensive quotations from the voir dire to

support its view that jurors actually understood the operation of the nullification instruction and indicated their willingness to follow it. *Id.* at 420-23; JA: 199-204.

This Court nonetheless rejected the view that a clearly crafted and communicated nullification instruction would permit constitutionally adequate consideration of mitigating evidence In this Court's view, although the nullification instruction in this case was "clearer" than the one in *Penry II* in commanding jurors to belie their honest answers to the special issues if mitigating evidence persuaded them to do so, "the clearer instruction given to petitioner's jury did not resolve the ethical problem" posed by nullification instructions. 543 U.S. at 47; JA: 235. From this Court's perspective, the core problem of nullification instructions is that they depend on jurors' willingness to violate their oaths to ensure consideration of mitigating evidence. Hence, telling jurors to do so clearly and emphatically is not a solution

Now, on remand, the CCA pointed to the same excerpts from voir dire in an attempt to demonstrate what it previously argued—that jurors understood the nullification command and hence were able to give meaningful effect to LaRoyce's mitigating evidence. According to the CCA

> During voir dire, both the State and applicant questioned almost all potential jurors regarding their ability to consider mitigating evidence. Both sides explained the process of allowing jurors to change one of the special issue answer [sic] from a 'yes' to a 'no' if they found mitigating evidence sufficient to warrant a life sentence rather than the death penalty Overwhelmingly, the jurors agreed that they could change a 'yes' answer to 'no' if instructed by the judge to do so upon finding sufficient mitigating evidence.

185 S.W.3d at 468; JA: 290.

The CCA's conclusion that meticulous explanation of the nullification instruction on voir dire ensured constitutionally adequate consideration of LaRoyce's mitigating evidence is

directly contrary to this Court's explicit conclusion on this point. The bottom line of this Court's summary reversal was that the CCA could not distinguish *Penry II* by finding the nullification command in this case particularly clear. In fact, this Court insisted that the clarity and forcefulness of a nullification command might well "intensif[y] the dilemma faced by ethical jurors." 543 U.S. at 47-48; JA: 235. The CCA's reassertion on remand that jurors could give effect to LaRoyce's mitigating evidence because they understood their power to answer the special issues untruthfully amounts to a blatant disregard of this Court's decision.[5]

In addition, the CCA appears to justify its disregard of this Court's summary reversal by suggesting that the trial record in this case did not support this Court's concerns that jurors would be uncomfortable lying to achieve a desirable result. According to the CCA:

> The Supreme Court specifically noted that the nullification instruction 'intensified the dilemma faced by ethical jurors' in this case. That is indeed a possibility, although neither the jurors who served, nor the parties or trial judge noted such a potential dilemma or expressed such a concern, either during voir dire or later.

185 S.W.3d at 468; JA 290-291.

In fact, this Court's concerns about the ethical dilemma posed by nullification instructions are amply vindicated by the trial court record. The very first juror to be seated, Gary Powell, had the most extended colloquy regarding the nullification instruction. Mr. Powell expressed surprise and dis-

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[5] The same sort of argument about the adequacy of voir dire to inform jurors of their power to falsify their answers to the special issues was made by the State in *Penry II* itself. *See* Respondent's Brief in *Penry*, JA 322-323 ("In each case, the supplemental instruction was exhibited and explained to the venire member, and any confusion arising from a venire member's initial exposure to the instruction was addressed until resolved.")

comfort when he was told on voir that he would be required to lie in order to give effect to mitigating evidence:

> Q . . . Now, some people tell us, can't do it. Other people tell us they could do it, that they could, in effect, misanswer one of the questions in order to arrive at the desired result.
>
> A Well, that [sic] a real tough choice. So the law, as you understand the way the verdict or the form would be submitted, there wouldn't be a fourth choice, any other mitigating circumstances? You have to take these three, work with these three, and regardless of how you might feel about these three, if you feel the other mitigating evidence indicated at that time was inappropriate, pick one of those three, any one, and answer no, just so you get the result that you think is correct?
>
> Q. As bizarre as that sounds, that's exactly right.
>
> A. Well, if that's the instruction from the Court, I could follow the instruction from the Court. Frankly, my legal sensibilities would be more comfortable if they just put a fourth element in there and just ask if there are any other mitigating circumstances that you find make it inappropriate, but if that's what the law requires –

JA: 25-26.

The trial judge then sought to explain that the nullification instruction was a response to this Court's decision in *Penry*. JA: 26-27. Mr. Powell, though he acknowledged he understood the circumstances leading to use of the nullification charge, continued to express qualms about its use:

> Q. [the Court] . . . Does that make a little bit more sense why it's done that way?
>
> A. Yeah, historically, now I understand why it's done that way. It just does seem illogical where you take an oath to answer all the questions correctly, and then you subvert that by—and the court says, "Well, in this one instance, we'll let you answer otherwise than what you feel is absolutely the truth in order to give effect to this other."

Well, maybe in the next session they will add a fourth element and just let you—to catch those mitigating circumstances.

Q. We're all hoping.

JA: 27.[6]

The voir dire of the other members of LaRoyce's jury was slight in comparison. In all cases, the prosecutor or defense counsel (or both) recited a lengthy account of the meaning of mitigating evidence and described jurors' ability to nullify their answers, and the juror would in one or two words affirm his or her understanding of the entire account, including his or her willingness to change his or her answers.[7] This sort of voir dire should not bolster confidence that jurors in fact felt free to answer the special issues untruthfully. Indeed, the relatively slight voir dire on the nullification instruction following the experience with Mr. Powell, the first seated juror, likely reflects the reluctance of the trial participants (prosecution, defense, and trial judge) to open a can of worms by highlighting what Mr. Powell's voir dire had confirmed: careful and extensive reflection on the meaning of the nullification instruction sharpened the conflict between that

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[6] Juror Wright's voir dire revealed similar levels of confusion and discomfort. It took several rounds of explanations and questions about the operation of the nullification mechanism to finally elicit from Juror Wright that she could "do it." *See supra* at 8, JA. 34 Ms Wright's hard-wrung concession, viewed in light of her prior answers, lends little confidence to the assertion that she or the other jurors in fact understood the nullification instruction

[7] *See, e g*, SF VIII 112-13, 133-34; (voir dire of Ava Meyer, Juror No 2), SF X 118, 136-37, (voir dire of Donna Coulter, Juror No 3), SF XI 58-60; (voir dire of Carol Keyte, Juror No 4), SF XI 162-65 (voir dire of Thomas Morrison, Juror No 5), SF XV 31-32 (voir dire of Theresa Lane, Juror No 7); SF XVI:18-19 (voir dire of Steven Dillow, Juror No 8), SF XVI 70-71 (voir dire of Janis Zeigler, Juror No. 9); SF XX·187-89, 204-06 (voir dire of Lynn Bartholomew, Juror No 10); SF XXI.53-54 (voir dire of Mary Foote, Juror No 11), SF XXV.105-07 (voir dire of Derek Fisher, Juror No 12)

instruction and the jurors' oath. Indeed, the voir dire of another juror, Lynn Bartholomew, who also served on LaRoyce's jury, reflects defense counsel's effort to downplay the ethical quandary of following the nullification instruction's command:

> Q . . . Like the prosecutor was telling you, the court will indicate that if you believe through what's called mitigating evidence—that's really anything. It's stuff that you could hear in the guilt-innocence phase; it's stuff that you could hear in the punishment phase; it's the whole totality of circumstances—if you felt that he shouldn't die, then you're authorized—actually the court says you shall, which is legal mumbo-jumbo for must, change one of the answers from 'yes' to 'no' if you feel that he should not die. Do you have any problem with that?
>
> A. No.
>
> Q. Okay. I mean, it's not like you're cheating or lying or doing something—
>
> A. No.

JA: 46-47.

Defense counsel's effort to assure this juror that following the nullification instruction would not amount to "cheating" or "lying," like the extended colloquy with Mr. Powell, contradicts the CCA's assertion that no one at trial recognized the ethical problem this Court highlighted in *Smith*.

Thus, the CCA's assertion that none of the participants in this case—"neither the jurors who served, nor the parties or trial judge"—expressed any concerns about the ethical dilemma posed by the nullification instruction is inaccurate. At the very outset of voir dire, the trial judge, defense counsel, and a seated juror voiced precisely those concerns. The seated juror recognized that the nullification instruction "subvert[ed]" his oath of honesty, defense counsel characterized the nullification mechanism as "bizarre," and the trial judge expressed "hop[e]" that the nullification device would be ren-

dered obsolete by the addition of a new special issue directly addressing the significance of mitigating factors. In such circumstances, the CCA's suggestion that the "ethical dilemma" described by this Court was a fanciful "possibility" belied by the facts on the ground simply cannot be credited.

2. The CCA relied upon a finding that the prosecutor did not contribute to the dilemma posed by the nullification instruction. That finding flouts a contrary finding made by this Court and is belied by the record.

In its summary reversal of the CCA's prior decision, this Court concluded that the prosecutor had sought to counter the effects of the nullification instruction by reminding jurors of their promises to "'follow the law' and return a 'Yes' answer to the special issues so long as the State met its burden of proof." 543 U.S. at 48 n.5; JA: 235. Such an admonition to the jury was similar to the prosecutor's exhortation to the jury in *Penry II* to "follow your oath, the evidence, and the law," *id.* (quoting *Penry II*), because it "reminded the jurors that they had to answer the special issues *dis*honestly" in order to give effect to mitigating evidence. *Id* Accordingly, this Court concluded that the prosecutor's comments in this case further supported its conclusion that the special issues in combination with the nullification instruction did not afford an adequate vehicle for the consideration of LaRoyce's mitigating evidence.

Notwithstanding this Court's specific conclusions, on remand the CCA reached the opposite conclusion, insisting that the prosecutor's closing arguments enhanced rather than undermined the likelihood that jurors could give effect to LaRoyce's mitigating evidence. 185 S.W.3d at 471; JA: 295 ("Significantly, the prosecutor never suggested that the jury should ignore or fail to consider any of applicant's mitigation evidence" in answering the special issues). In the CCA's view, the absence of prosecutorial argument telling jurors to

ignore LaRoyce's mitigation evidence supported its conclusion that petitioner failed to establish "that the jury was unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take into account the specific evidence of his relatively low IQ test at the age of thirteen, his participation in a special education reading program and speech therapy, or his troubled family background." 185 S.W.3d. at 471-72; JA 296-297.

This argument, like the CCA's reliance on the clarity of the voir dire, rejects this Court's explicit conclusions that the nullification instruction, in the context of LaRoyce's trial, was constitutionally inadequate and that "the nullification instruction may have been more confusing for the jury to implement in practice than the state court assumed." 543 U.S. at 48, n.5; JA: 235 More fundamentally, the argument depends on the CCA's tenacious belief that an unambiguous nullification command can serve as a constitutionally adequate means of facilitating consideration of mitigating evidence. Some members of the CCA have gone so far as to repudiate explicitly their duty to follow this Court's decision in *Penry II*. *See, e.g*, 185 S.W.3d at 474; JA 301-302 (Hervey, J., joined by Keasler, J., concurring) ("we are not bound by the view expressed in *Penry II* that Texas jurors are incapable of remembering, understanding and giving effect to the straight-forward and manageable 'nullification' instruction such as the one on this case"); *Ex parte Smith*, 132 S.W.3d at 427; JA: 212 (Hervey, J., joined by Keasler J., concurring) ("we may disagree with the United States Supreme Court that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case") (using "but see" citation reference to *Penry II*). Given this Court's unequivocal rejection of the CCA's position that a "clear" nullification instruction solves the *Penry II* problem, the CCA's claim that the prosecutor did not undermine the

purported clarity of the nullification instruction is plainly irrelevant.

Moreover, in asserting that the prosecutor did not aggravate the nullification problem, the CCA fails to mention much less discuss or credit this Court's conclusion to the contrary. When this Court makes an assessment of the constitutional significance of particular facts, it is not an option for the state court to ignore or revisit that assessment on remand. *See, e.g*, *Dean v. Hickman*, 358 U.S. 57 (1958) (*per curiam*) (granting motion for leave to file a petition for mandamus based on state court's assertion of power, after remand by this Court, "to adjudicate, upon its own independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States" a determination made by this Court).

Finally, the CCA's claim about the nature and effect of the prosecutor's argument is also belied by the record. In addition to the admonitions quoted in this Court's prior opinion, 543 U.S. at 48, n.5; JA: 235 (reminding jurors that they had promised to "'follow the law' and return a 'Yes' answer to the special issues so long as the State met its burden of proof"), other prosecutorial comments on voir dire and during the punishment phase closing argument likewise reflect an effort to restrict the scope of the special issues inquiry. During voir dire, the prosecutors repeatedly and at great length insisted that jurors commit themselves to answering the special issues honestly based only on the facts and not with an eye to imposing a particular sentence: "If the facts indicate any of these questions should be answered yes and that means he dies, well, that's just what the facts call for and that's they way you vote." JA: 37 (prosecutor's voir dire of Teresa Lane, Juror No. 7). *See also* JA: 42 (prosecutor's voir dire of Lynn Bartholomew, Juror No. 10); JA: 30 (prosecutor's voir dire of Dottie Wright, Juror No. 6). During closing argument, the prosecutor reinforced this message by asking the jurors to recall their responses to these admonitions during voir dire: "You told us . . . if you prove to me that the answers to

those special issues should be yes, then I can answer them yes." JA: 111. The prosecutor also reminded the jurors that they had promised they could return an affirmative answer to the dangerousness special issue based solely on the crime itself, JA: 114 ("You said you could answer the question number two yes just based on one act alone.").

Given these sorts of prosecutorial arguments, which discouraged jurors from viewing the special issues as a broad vehicle to assess the appropriate punishment, this Court was undoubtedly correct to conclude that the purportedly "clear" nullification instruction "may have been more confusing for the jury to implement in practice than the state court assumed." 543 U.S. at 48 n.5; JA: 235. In any case, the CCA could not ignore this conclusion on remand and reargue that the nullification mechanism actually ensured adequate consideration of LaRoyce's mitigating evidence.

3. The CCA's insistence that the scope and power of LaRoyce's mitigating evidence ameliorated the constitutional violation in this case cannot be squared with this Court's conclusion that the special issues in combination with the nullification instruction did not provide an adequate vehicle for the consideration of LaRoyce's evidence. In fact, the CCA's acknowledgement of the extent and force of LaRoyce's evidence compels the conclusion that the error identified by this Court cannot be deemed harmless.

In the last prong of its analysis supporting its ultimate conclusion that LaRoyce could not show sufficient harm to warrant relief, the CCA highlighted the strength of LaRoyce's mitigating evidence and the powerful presentation of such evidence during closing argument:

> All of his mitigating evidence was admitted, defense counsel did a superb job of weaving all of that evidence

> into a compelling theory of the case, and his attorneys presented a strong, coherent, and persuasive closing argument on punishment. We therefore conclude that applicant has failed to show, by a preponderance of the evidence, that the unobjected-to-jury nullification instruction caused him "egregious harm."

185 S.W.3d at 472; JA: 298.

On its face, this sort of argument is counter-intuitive. If the constitutional error identified by this Court involved extensive and persuasively-argued mitigating evidence, the likelihood of harm is overwhelming. The CCA's position, though, is that the power and extensiveness of LaRoyce's mitigating evidence undermined this Court's conclusion that jurors would have been unable to give effect to such evidence. *Id.*, 185 S.W.3d at 471; JA: 296 (petitioner did not establish sufficient harm because he had failed to establish that jurors were "unable to consider the totality of his extensive mitigating evidence"). The CCA's claim in this regard appears to be twofold. First, the CCA seems to suggest that abundance of mitigating evidence likely contributed to jurors' perceptions that they could nullify their answers to the special issue in response to such evidence. Second, the CCA appears to argue that much of LaRoyce's evidence could have been addressed without recourse to the nullification instruction because defense counsel argued that LaRoyce was remorseful and capable of rehabilitation. Neither of these conclusions is tenable, and both are inconsistent with this Court's holding.

The fact that defense counsel introduced extensive mitigating evidence, including evidence of LaRoyce's low intelligence, placement in special education from an early age, and troubled family background, did not solve or ameliorate the constitutional defect in the sentencing instructions in this case. While it is true that defense counsel reminded jurors of their duty to falsify their truthful answers, 185 S.W.3d at 470; JA: 293 ("if you think that he should not die, you are to put

'no' in one of the spaces"), and gave them ample reason to reject the death penalty based on LaRoyce's very low intelligence and troubled background, the force of his argument only intensified the dilemma faced by ethical jurors. Jurors who were persuaded that LaRoyce did not deserve to die were required to answer the special issues untruthfully, and the fact that defense counsel gave them a strong incentive for lying did not ensure that they would have felt less troubled about doing so. In short, the CCA's claim that the extensiveness of LaRoyce's mitigating evidence made it less likely that the error was harmful is simply another reiteration of its argument that a clear nullification instruction would have ensured adequate consideration of relevant mitigating evidence.[8] Such a conclusion is implausible and, given this Court's explicit holding to the contrary, unavailable.

The CCA also seems to suggest that LaRoyce's mitigating evidence, including his evidence of low intelligence, long-term placement in special education, and his troubled background, could have been given significant effect within the special issues, especially in light of how such evidence was argued at punishment. This argument, too, is foreclosed by this Court's opinion, which found that "the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." 543 U.S. at 48; JA. 235. Although the CCA asserts that this Court "did not address our conclusion 'that the two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence,'" 185 S.W.3d at 463;

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[8] The fact of the well-presented argument "is beside the point because in the absence of a vehicle—a proper mitigation question—the jury had no way to express its reasoned moral response to the *argument* in mitigation, and the *evidence* in mitigation." *Ex parte Smith*, 185 S.W.3d at 480 (Holcomb, J., dissenting) (emphasis in original).

JA: 281,[9] the Court's declaration that the inquiries of the special issues "had little, if anything, to do with" LaRoyce's mitigation evidence unambiguously finds those issues inadequate to permit consideration of such evidence.

In addition, this Court's decision in *Smith* came on the heels of its decision in *Tennard v. Dretke*, 542 U.S. 274, (2004), which declared that the relationship between the special issues and the defendant's evidence of his low IQ had "the same essential features as the [relationship between the special] issues and Penry's mental retardation evidence." The Court explained that "[i]mpaired intellectual functioning has mitigating dimension beyond the impact it has on the individual's ability to act deliberately," and that "the jury might have given [the defendant's] low IQ evidence aggravating effect in considering [his] future dangerousness." *Id.* In such circumstances, it is quite understandable that this Court's summary reversal did not explain at length why LaRoyce's evidence of low intelligence and placement in special education must be treated similarly, for *Penry* purposes, to Penry's evidence of mental retardation and Tennard's evidence of low IQ. Contrary to the Respondent's position, the Court's decision not to belabor this point does not undermine in the least the binding quality of this Court's pronouncement in this case that the special issues "had little, if anything, to do with the mitigation

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[9] The CCA later appears to concede the possibility that this Court's remand was premised on a finding of *Penry* error: "Nonetheless, because we are uncertain as to the Supreme Court's current *Penry II* jurisprudence, we will assume, for the sake of argument, that at least some of applicant's evidence was not fully encompassed by the two special issues Thus, we shall assume the jury charge in this case was constitutionally deficient under *Penry II*" 185 S.W 3d at 466-67 Despite its lip-service to the finding of *Penry* error in this case, the CCA's harm analysis is premised entirely on its continued insistence that the special issues and the nullification instruction enabled constitutionally adequate consideration of petitioner's mitigating evidence—a clear rejection of conclusions that were essential to this Court's finding of *Penry* error

evidence petitioner presented." See Respondent's Brief in Opposition to Certiorari at 12 ("This remark suggests the statutory issues may be insufficient if an analysis were made, but the remark is not supported by any *Penry I* analysis or a cite to case law.").

Moreover, the presentation of LaRoyce's mitigating evidence during the punishment phase reveals that his counsel never argued that LaRoyce's intellectual deficits, placement in special education, or troubled background somehow justified a negative answer to the deliberateness or dangerousness special issues. Defense counsel did actively challenge the State's evidence with respect to both inquiries. He began by stating "[t]here's two special issues" and "I want to talk about both of them." JA: 117. He first argued that the jury could reject deliberateness by looking at the autopsy report and evidence of the actual blows inflicted on the victim, JA: 118, plainly viewing deliberateness as a narrow inquiry focused on the defendant's actions at the time of the crime. Defense counsel also sought to counter the state's evidence of dangerousness, arguing that LaRoyce's lack of a serious prior criminal record supported a negative answer to the second special issue. JA: 119 In this regard, defense counsel attempted to minimize the significance of LaRoyce's prior interaction with the criminal justice system and his behavior problems in school, SF 33:47-49, emphasized that LaRoyce did not brag about the killing, SF 33:53, and reminded jurors that LaRoyce had behaved well during his pre-trial incarceration. SF 33:54. Later in the argument, defense counsel likewise sought to disprove dangerousness by pointing to the numerous character witnesses who testified to their positive interactions with LaRoyce. SF 33:61-66.

When defense counsel turned to LaRoyce's evidence of his low IQ, his special education in school, and his troubled background, though, he shifted gears ("I want to talk to you about mitigating evidence") and never attempted to suggest

that this evidence supported a negative answer to the special issues. Rather he urged that the evidence is "something that you should consider:"

> I want to talk to you about mitigating evidence. First of all, about special education. Now, from 1978, there's evidence—now, it's not like he had been plotting and planning since 1978 that maybe one day he'll do something and that it will be good to have this stuff. That's the way he is. The evidence we have, medical diagnosis, slow learner, may be organic. Objective test data, IQ 78. He is eight points from being mentally retarded. . . .
>
> Look at the record, then, in '86, still having problems, mark through promote. You all heard of social promotion. It's probably a football promotion, too. Family problems. Lucas will say "Well, we've all had problems and many of us have been raised by single parents." That's true, but how many of us have had our daddies sell our appliances for crack, that we've had to take and hide our V.C.R.'s, our T.V.'s, our freezers, so our own daddy wouldn't go and sell it for crack? You know that that has an impact on someone. It has an impact on how they act in school. Now, Lucas will say, "Well, you blame school, you blame the parents. We're doing the best we can." We're not blaming the school, and we're not blaming the parents. We're telling you that it's something that happened and it's something that you should consider because it's not black and white.

JA: 120-121.

Thus, while the CCA is undoubtedly accurate in asserting that defense counsel offered extensive evidence in support of a "primary theme" that LaRoyce "was a young man whose life was worth saving," 185 S.W.3d at 470; JA at 297, many of those arguments for saving LaRoyce's life had nothing to do with the deliberateness and dangerousness special issues. There is literally nothing in defense counsel's closing argument that increased the likelihood that jurors would have regarded his low intelligence, placement in special education,

and troubled background as reasons, independent of the nullification instruction, to arrive at a "no" answer to the deliberateness or dangerousness questions. The fact that defense counsel offered evidence and argument *apart* from his low intelligence, special education background, and troubled background to attempt to persuade jurors to say no to deliberateness and dangerousness in no way suggests that jurors would have likely regarded *all* of his evidence as bearing on those inquiries. Indeed, the presence of the nullification instruction—with its invitation to consider evidence with "no relationship to any of the Special Issues," *see* JA: 107—made it much less likely that jurors would have believed that all of LaRoyce's mitigating evidence was relevant to the deliberateness or dangerousness inquiries.

Accordingly, the trial record documenting LaRoyce's mitigating evidence and its presentation during closing argument confirms what this Court has already concluded: that the special issues, alone or in combination with the nullification instruction, were an inadequate vehicle for considering LaRoyce's mitigating evidence

B. The CCA's Methodology of Assessing Harm by Reassessing Whether, in the Context of LaRoyce's Trial, Jurors Were in Fact Precluded from Giving Effect to LaRoyce's Mitigating Evidence, Fails to Recognize that this Court's Finding of Constitutional Error in this Case Already Entailed Precisely the Same Inquiry.

The common thread of the CCA's arguments above is that the particulars of LaRoyce's trial, including the voir dire, prosecutorial argument, and defense presentation of the evidence, ensured that jurors were able to give meaningful consideration to LaRoyce's mitigating evidence and thus precluded a finding of significant harm. The CCA regarded the summary reversal in this case as only highlighting the "possibility" that jurors would have found themselves precluded

from giving effect to such evidence, 185 S.W.3d at 468; JA: 291, and it viewed the remand as an occasion for determining whether in fact jurors were so precluded.

This tactic misunderstands this Court's approach to claims that sentencing instructions unconstitutionally constrain consideration of mitigating evidence. The Court has consistently held that such claims require an examination of the instruction "in light of all that has taken place in the trial" to determine whether there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant mitigating evidence." *Boyde v. California*, 494 U.S. 370, 371 (1990). *See also Ayers v. Belmontes*, 2006 WL 3257143 (U.S.), slip op. at *5 (citing *Boyde*).

Accordingly, this Court engaged in precisely this inquiry in its summary reversal in this case. It found *Penry I* error because the nature of LaRoyce's evidence—including his low IQ, his placement in special education, and his troubled background—could not be given adequate consideration. It found, in accord with *Penry II*, that this defect was not overcome by the addition of a supplemental nullification instruction that invited jurors to answer the special issues falsely to give effect to mitigating evidence. 543 U.S. at 47; JA: 233. It addressed and rejected the CCA's contention that the particular circumstances of LaRoyce's trial ensured that jurors could follow the nullification instruction, both because this Court questioned the CCA's assumption that the nullification message was not diluted by aspects of LaRoyce's trial, and because even a crystal clear command "could possibly have intensified the dilemma faced by ethical jurors." *Id.* at 48; JA: 235. In assessing the effect of the nullification command, this Court emphasized that the verdict form given to the jurors "made no mention whatsoever of mitigation evidence" and that jurors might not have remembered an oral directive to answer the special issues falsely when the written questions before them said nothing of the sort. *Id.* 48. This

Court also viewed the prosecutor's closing arguments, which reminded jurors that they had promised to "follow the law" and to answer the special issues affirmatively "so long as the State met its burden of proof," as undercutting the nullification message. *Id.* at 48 n.5; JA: 235. Hence, the Court's determination of constitutional error in this case entailed its finding that the particulars of LaRoyce's trial did not ensure adequate consideration of the mitigating evidence.

Accordingly, the CCA was wrong not to accept as a *premise* of its harm analysis that LaRoyce's mitigating evidence was outside the effective reach of the jury. By selectively canvassing the record and ignoring this Court's assessment of the factors relevant to the inquiry, the CCA managed to *conclude* precisely what this Court rejected—that, given the instructions in the context of trial, LaRoyce had failed to establish "that the jury was unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take into account the specific evidence of his relatively low IQ test at the age of thirteen, his participation in a special education reading program and speech therapy, or his troubled family background." 185 S.W.3d at 471-72; JA: 296-297.

Because the CCA's harm analysis rested entirely on its rejection of particular conclusions that were essential to this Court's determination of *Penry* error, the CCA's conclusion that the *Penry* error in this case was harmless cannot stand.

C. The *Penry* Error in this Case Was Harmful Under Any Standard, Including the "Egregious Harm" Standard Imposed by the CCA.

If the CCA had accepted rather than rejected this Court's conclusive determination that constitutional error occurred during the sentencing phase of this case, it would not and could not have deemed that error harmless under any standard. The CCA itself acknowledged the "extensive" nature of LaRoyce's

mitigating evidence and the "strong" arguments made by defense counsel to the jury on the basis of that evidence. 185 S.W. 3d 471-72; JA: 296-298.[10] But the CCA plainly disregarded this Court's determination that the special issues and the nullification instruction failed to provide the jury with a vehicle to give mitigating effect to the extensive evidence of LaRoyce's cognitive impairment, learning problems, and troubled family background. Had the CCA followed this Court's mandate, it would have been forced to acknowledge that LaRoyce's mitigating evidence—without an appropriate vehicle to give it mitigating effect—could have only enhanced jurors' concerns about LaRoyce's future dangerousness instead of serving as a "a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). When extensive evidence of the kind that "might well have influenced the jury's appraisal of [the accused's] moral culpability," *Williams v. Taylor*, 529 U.S. 362, 398 (2000), is not only precluded from consideration as mitigating *but also is admitted as aggravating*, a finding of "harm" is unavoidable.

A finding of harm is equally compelled under the "egregious harm" standard applied by the CCA.[11] The CCA explains that the inquiry into "egregious harm" is essentially an inquiry into the "fundamental[]" fairness of the proceed-

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[10] The CCA referred to the evidence as "extensive" and noted the defense's "dramatic account of [LaRoyce's] humanity" and "superb job of weaving all of that evidence into a compelling theory of the case" during its "strong, coherent, and persuasive closing argument on punishment." 185 S.W 3d at 471-72; JA. 296-298.

[11] Petitioner in no way concedes the constitutionality of the CCA's imposition of its "egregious harm" standard as a result of its reconsideration on remand of the adequacy of petitioner's preservation of his constitutional claim, *see infra* pages 39-50 However, determining the correct harmless error standard is not necessary to the resolution of this case because it is manifest that petitioner suffered harm from his constitutionally defective sentencing proceeding under any standard, including the "egregious harm" standard

ing. 185 S.W.3d at 472; JA: 298. Whatever else "fundamental fairness" might be thought to require, a capital sentencing proceeding cannot be deemed "fundamentally fair" if extensive evidence that might well have saved the life of the accused was allowed consideration only to the extent that it made his execution *more*, rather than less, likely.

Recognition of the magnitude of the harm in this case does not require the conclusion that any and all *Penry* errors are *per se* harmful.[12] The relevant inquiry is whether the nature and extent of LaRoyce's evidence could have persuaded jurors to embrace a life sentence, and whether the same evidence could also have had substantial aggravating significance. So, for example, if LaRoyce's sole evidence had been that he had average intelligence but had failed a class in third grade, a court might justifiably conclude that such evidence, though outside the jury's effective reach, was so insubstantial in its mitigating force and so unlikely to add significantly to the case for future dangerousness that it would not likely have affected the jury's ultimate judgment. Here, however, by any measure and by the CCA's own account, LaRoyce's mitigating evidence was quite substantial. Moreover, that evidence undoubtedly had the same "two-edged" relevance to the question of future dangerousness as did the evidence offered in *Penry* itself. *Penry I*, 492 U S at 324 Under such circumstances, a finding of harm is inescapable, however the standard is framed.

Apart from the CCA's own characterization, the mitigating evidence was indeed substantial by any measure, both in its

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[12] Petitioner argued below and has preserved before this Court the position that *Penry II* might constitute structural error because it affects the overall manner in which evidence is received or considered *See* Petition for Writ of Certiorari at 21, n 14 However, because it is evident that petitioner suffered harm under any standard, this Court need not resolve whether *Penry II* error falls within the class of claims exempt from harm analysis *Arizona v Fulminante*, 499 U S 279 (1991).

quantity and in its mitigating power. First, consider the sheer quantity of mitigating evidence offered on behalf of LaRoyce. Numerous witnesses and exhibits during both the guilt phase and the punishment phase established LaRoyce's cognitive impairment, low aptitude and low achievement.[13] This detailed account of LaRoyce's intellectual limitations was a key element of the defense's mitigation theory and accounted for the bulk of defense penalty phase exhibits admitted into evidence and submitted to the jury.

Second, LaRoyce's mitigating evidence was not only "extensive" in scope and detail, it was of a kind that this Court has repeatedly recognized as especially powerful. As defense counsel argued to the jury, referencing LaRoyce's IQ score of 78: "He is eight points from being mentally retarded." JA: 120. This Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that defendants who have mental retardation are categorically exempt from capital punishment under the Eighth Amendment, recognized the myriad ways in which severe cognitive deficiencies "diminish [defendants'] personal culpability," *id.* at 318:

> Because of their impairments . . . they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . [T]here is abundant evidence that they often act on im-

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[13] *See* JA 85 (testimony); JA II: 58 (exhibit) (full scale IQ as low as 78); JA II: 25 (learning problems possibly organic in nature); JA II 10 (progress report stating "[h]e is slow and has difficulty remembering what he has learned"), JA II: 27 (indicating at age ten, receptive vocabulary skills of a 6 1/2-year-old), JA II: 58, (reading at second-grade level one month shy of fourteenth birthday), JA 120 (reaching ninth grade by age nineteen only because of "social" or "football" promotion, despite having failed all eighth-grade courses)

> pulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Id

LaRoyce's extensive evidence of limited cognitive and adaptive skills throughout his childhood, coupled with his low IQ, places him very close to complete exclusion from death eligibility; there can be no question that evidence of this type is particularly potent evidence of reduced culpability. Furthermore, the detailed evidence of LaRoyce's unstable and troubled home life reinforced and deepened the defense portrait of his reduced moral culpability. *See supra* at pp 3, 5.

In numerous cases, this Court has recognized the likelihood that evidence of these two types would sway at least one juror to change the verdict from death to life. In *Penry I* itself, this Court explained:

> Because Penry was mentally retarded . . . and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, [a rational juror could conclude that] Penry was less morally culpable than defendants who have no such excuse.

492 U.S. at 322 (internal citations omitted). *See also Wiggins v Smith*, 539 U.S. 510, 512 (2003) (evidence of childhood abuse established a "reasonable probability that at least one juror would have struck a different balance"); *Williams*, 529 U.S. at 398 (2000) (evidence that defendant was borderline mentally retarded, coupled with evidence of childhood abuse, "might well have influenced the jury's appraisal of his moral culpability.").

Unlike the defendants in *Wiggins* and *Williams*, whose double-edged evidence was never presented to the jury, LaRoyce was not merely denied the powerful mitigating effect of his evidence of reduced culpability; he was also harmed by the *aggravating* effect of that evidence in relation to the special issue regarding future dangerousness. As this Court recognized in *Penry I*, evidence of cognitive impair-

ment and troubled childhood is a distinctively "two-edged sword" in that "it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." 492 U.S. at 324.

The jurors could reasonably have concluded that LaRoyce's substantial cognitive impairments rendered him less able to learn from his mistakes, to avoid dangerous situations, to control his impulses, or to resist negative peer influences (which he would undoubtedly encounter in a prison setting). Moreover, it is obvious that the jurors might reasonably have concluded that LaRoyce's repeated exposure throughout his childhood to drug use, theft, robbery, and violence would make him more likely to engage in such behavior as an adult than one who had a relatively stable childhood with positive role models.

Only by flouting this Court's mandate and holding that the sentencing jury *was* able to give mitigating effect to LaRoyce's extensive mitigating evidence could the CCA deny that LaRoyce was harmed by the *Penry* error in his case. Indeed, the CCA's recognition of the "strong" presentation by the defense of its mitigating case *enhances* rather than detracts from the harmfulness of the error. If a case is close on the question of life or death, mitigating evidence that is precluded from consideration becomes that much *more* important. LaRoyce's youth, his lack of a serious prior criminal record, and the many character witnesses who testified on his behalf all confirm the CCA's observation that defense counsel mounted a "well-crafted," though unsuccessful, argument that his life was "worth saving." 185 S.W.3d at 472; JA: 297. If the jury had been afforded a constitutionally adequate vehicle to consider the mitigating effect of LaRoyce's evidence of cognitive impairment, learning problems, and troubled family background, such a close case may well have turned the other way. Under these circumstances, a finding of harm under any standard—perhaps especially under a standard that purports to look at "fundamental fairness"—is compelled.

This case involves no substantive issues of death penalty law. Those issues—whether the strictures of *Penry I* and *Penry II* were violated in this case—were decided by this Court's summary reversal. Nor does this case present a genuine question about whether the *Penry* error in this case was harmful. The answer to that question is compelled by the CCA's own acknowledgement of the extensiveness of the mitigating evidence offered in this case and precluded from consideration as a result of the *Penry* error found by this Court, leaving only the potentially aggravating import of the evidence for the jury's consideration. Rather, this case concerns this Court's authority "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and to have its final judgments be "conclusive upon the parties." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 355 (1816) The CCA's harmless error analysis on remand was fundamentally dependant upon the CCA's rejection of this Court's legal conclusions and thus constitutes a violation of this Court's mandate. There is simply no way to parse the CCA's opinion so as to render it "not inconsistent" with this Court's opinion. This Court's role as the final arbiter of federal law entails the power and responsibility to protect the integrity of its mandates. The CCA's decision must be reversed.

II. AS THE CCA'S IMPOSITION OF AN "EGREGIOUS HARM" REQUIREMENT VIOLATES FEDERAL LAW, THE CCA'S ACKNOWLEDGEMENT THAT LAROYCE "MAY HAVE SUFFERED 'SOME' ACTUAL HARM" COMPELS RELIEF.

The CCA's requirement that LaRoyce demonstrate "egregious harm" as a predicate for relief, based on his purported failure to make an appropriate contemporaneous objection to the sentencing instructions in this case, independently violates federal law and constitutes a separate basis for reversing the CCA decision. The imposition of the egregious harm standard

violates federal law in three respects, any one of which is a constitutionally sufficient basis for rejecting the CCA's recourse to that standard. First, the CCA's refusal to deem LaRoyce's objection inadequate in its decision prior to the remand precludes revisiting that issue on remand. Permitting state courts to resurrect procedural obstacles after this Court grants relief on the merits would empower state courts to manipulate this Court's appellate jurisdiction and render many of this Court's opinions "advisory" in violation of the case or controversy requirements of Article III. Second, LaRoyce's objections to the failings of the special issue scheme and the nullification instruction clearly satisfied state law, and the CCA's contrary conclusion depends on a misunderstanding of the applicable federal right. Lastly, if LaRoyce's efforts to preserve his federal constitutional rights were insufficient under state law, the state law impediments to the vindication of such rights excessively burden the enforcement of federal law.

The CCA, in stating that LaRoyce "may have suffered 'some' actual harm" from the failure of the sentencing scheme to give adequate effect to his mitigating evidence, has already acknowledged that LaRoyce must receive relief absent the unjustified imposition of its egregious harm standard. Accordingly, even if the CCA's harmless error analysis were not defective for its repudiation of the merits of this Court's decision, its inappropriate requirement of "egregious harm" independently calls for reversal of the CCA decision.

A. The CCA Already Considered and Rejected the View that LaRoyce Failed to Preserve His *Penry* Claim at Trial. The CCA's Effort to Revisit that Determination Following this Court's Reversal on the Merits Threatens Two Core Aspects of this Court's Appellate Jurisdiction.

In its original consideration of this case, prior to this Court's reversal, four CCA judges in two different concurring

opinions asserted that LaRoyce had failed to preserve his claim that the special issues and nullification instruction precluded adequate consideration of his mitigating evidence. *See* 132 S.W.2d at 423; JA: 205 (Hervey, J., joined by Keasler, J., concurring); *Id* at 428; JA: 214 (Holcomb, J., joined by Price, J., concurring). The asserted basis for default was LaRoyce's purported failure to make an appropriate trial objection to the instructions. Despite these arguments, the majority refused to impose a state procedural default and decided the case on its federal constitutional merits. In its summary reversal, this Court specifically noted the CCA's refusal, over the objection of four judges, to impose a procedural bar in its decision. 543 U.S. at 43 n.3; JA: 230.

On remand, the CCA concluded that LaRoyce had to show that the constitutional violation identified by this Court caused "egregious harm" rather than "some harm" under *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984). The CCA acknowledged that defense counsel had filed two pretrial motions challenging the failure of the special issues to allow adequate consideration of his mitigating evidence and had asserted that state law did not permit the trial court to modify the statutorily-authorized special verdict form via the nullification instruction. 185 S.W.3d at 461 n.8; JA: 278. Nonetheless, the CCA concluded that application of the "egregious harm" standard was warranted because LaRoyce did not make a specific objection to the jury nullification instruction during the punishment-charge conference. *Id.* at 461; JA: 288. Thus, the CCA applied the egregious harm standard post-remand based on precisely the same facts on which it refused, pre-remand, to impose a procedural default.

1. The CCA may not undercut this Court's merits decision by revisiting its refusal to impose a procedural bar in this case.

This Court exercises its appellate jurisdiction over state court decisions sparingly and only in circumstances where the

federal issue controls the outcome of the litigation. The reasons for such restraint are both prudential and constitutional. This Court's resources are best expended on cases where the application of federal norms is essential, and the "case" or "controversy" requirement of Article III commands that this Court's pronouncements regarding federal law occur only when such interpretations are an indispensable aspect of adjudicating the rights of actual litigants. As this Court declared in *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945), when it declined to apply federal law in a circumstance where it was uncertain whether a state law basis for decision might ultimately control the outcome of the litigation:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Id. at 126-27 (internal citations omitted).

For that reason, this Court carefully reviews petitions for review arising from the state courts to assess whether the judgment from the state court might rest on a state ground for decision. *See id.* at 128 ("It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law. Nor will we review one until the fact that it does not do so appears of record.").

When this Court first agreed to review this case, it had no reason to believe that LaRoyce's claim was procedurally compromised by his failure to make an appropriate objection. Indeed, this Court thought it worthy of mention that the majority of the CCA refused to credit the concurring judges' view of procedural irregularity—the same purported procedural irregularity on which the CCA now relies. In such circumstances, the CCA's decision to address LaRoyce's federal rights was a clear signal to this Court that the outcome of the case depended on the application of federal law rather than the enforcement of state procedural rules. If state courts were free to revisit procedural determinations after this Court's review, this Court would regularly be frustrated in its scrupulous efforts to avoid advisory pronouncements.

Moreover, the CCA's choice to revisit its declination of a state ground of decision amounts to an unacceptable manipulation of its procedural rules to defeat this Court's adjudication of LaRoyce's *Penry* claim. This Court has consistently rejected efforts of state courts to evade the consequences of this Court's applications of federal law via belated assertions of state grounds for decision. *See, e g , Ford v Georgia*, 498 U.S. 411, 421-25 (1991) (rejecting application of newly-announced state procedural requirement on remand); *Yates v. Aiken*, 484 U.S. 211, 214-15 (1988) (rejecting State's argument that the state court, on remand from this Court's decision finding federal constitutional error, could craft state nonretroactivity rule to deny relief because mandate contemplated application of federal not state law). This principle is especially compelling when, as here, the purported state law basis for decision was recognized and available as a basis for decision prior to this Court's intervention on the merits. *See, e g., NAACP v. Alabama ex rel Patterson*, 360 U.S. 240, 244-45 (1959) (rejecting State's effort on remand to evade consequences of this Court's decision by recasting its analysis of petitioner's compliance with state law and stating that "the

State is bound by its previously taken position" regarding the extent of petitioner's noncompliance).

Thus, the CCA's decision on remand to punish LaRoyce for his purported failure to make an adequate objection at trial, on the heels of its unwillingness to deem the objection inadequate before this Court's reversal on the merits, amounts to an impermissible "bait and switch," threatening two core aspects of this Court's appellate jurisdiction. The belated assertion of the procedural obstacle undermines this Court's constitutionally-based commitment to resolving issues of federal law in cases where federal principles dictate the outcome of the litigation, thereby avoiding advisory opinions. Moreover, left uncorrected, the bait and switch in this case threatens this Court's enforcement of federal constitutional norms because the CCA's decision is nothing less than an opportunistic invocation of state law to avoid compliance with this Court's decision.

2. The CCA's refusal, prior to remand, to default LaRoyce's *Penry* claim cannot be reconciled with its post-remand imposition of the egregious harm standard on the theory suggested by respondent: that *Penry* claims are not defaultable as a matter of state law.

Respondent argues that the CCA's initial decision in this case—refusing to find LaRoyce's *Penry* claim defaulted based on the purported lack of a contemporaneous objection—should not be construed as rejecting the procedural basis for the default. According to respondent, the best explanation for the CCA's refusal to default LaRoyce's claim is that "Texas law simply did not permit it," because constitutional claims regarding jury charge error are not defaultable in state habeas proceedings. BIO at 28.

Respondent's argument is untenable for several reasons. First, the CCA's own opinions in this case lend no support for the theory. The four judges who concurred in the initial

decision clearly regarded *Penry* claims as defaultable. Three of those judges joined the current opinion,[14] and their votes were necessary to support the 7-1 judgment. Second, in other cases the CCA has consistently treated *Penry* claims as defaultable. *See, e g , Black v State*, 816 S.W 2d 350, 360 (Tex Crim. App. 1991) (Campbell, J., concurring) (recognizing that *Penry* claims are defaultable but refusing to impose default because such claims fell within a "right-not-recognized" exception to default doctrine). Indeed, the CCA has imposed defaults based on the absence of contemporaneous objection in several prior cases, including cases involving alleged *Penry* error. *See, e g., Nichols v Scott*, 69 F.3d 1255, 1266 (5th Cir. 1995) (upholding CCA's procedural default of applicant's *Penry* claim regarding his non-triggerman status based on applicant's "failure to object to the punishment charge"); *accord Turner v Johnson*, 1997 U.S App. LEXIS 12669 (1997) (finding no basis for overcoming CCA default of jury instruction claim for lack of a timely objection). The absence of *any* state decisions denying or undercutting the applicability of procedural default to jury instruction claims on state habeas is reflected in a recent federal district court decision: "Petitioner alleges no facts and cites this Court to no Texas case law showing the Texas courts have inconsistently applied the contemporaneous objection rule in similar contexts, i.e., with regard to alleged constitutional errors in a jury

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[14] Judge Holcomb, who concurred in the denial of relief prior to this Court's intervention, dissented from the denial of relief on remand He rejected the majority's imposition of its egregious harm standard, concluding that a close examination of the record did not support his initial view that petitioner's trial objections were inadequate under state law 185 S W 3d at 474, JA at 303 ("Although I was once persuaded to believe otherwise, Smith's federal constitutional claim that he was denied an effective vehicle by which a jury could consider and give effect to his mitigating evidence was not procedurally defaulted ") He did not question the assumption of his earlier opinion that *Penry* claims are defaultable in the absence of a valid contemporaneous objection

charge." *Martinez v. Dretke*, 426 F.Supp.2d 403, 527 (W.D. Tex. 2006).

In light of this authority, there is simply no basis for respondent's claim that Texas law does not authorize the application of its procedural default rules to jury instruction claims on state habeas.[15] Moreover, respondent's assertion of such a position is undercut by its own insistence, after the Court's remand in this case, that the CCA impose a procedural default to LaRoyce's claim based on the lack of a contemporaneous objection at trial. State's Brief on Remand at 7; JA at 246 ("Applicant has procedurally defaulted this claim under Texas law because he did not raise any objection to the charge at trial or on appeal."). Having just argued to the CCA that it should impose the procedural default, and thereby insulate the CCA's opinion from further review in this Court, State's Brief on Remand at 8; JA at 246-247 ("The Supreme Court will not review a decision by a state's highest court if it rests on a state law ground independent and adequate to support the result."), the State cannot now insist that "Texas law simply d[oes] not permit" default under such circumstances.

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[15] In its supplement brief in opposition to certiorari, respondent attempts to distinguish cases in which the CCA or the federal courts have upheld procedural defaults Supp. BIO at 9-14 ("III Charge error is not generally forfeitable in Texas") But respondent fails to offer any affirmative support for its contention that such claims are not defaultable on state habeas The sole case it offers along these lines, *Ex parte Baldree*, 810 S W 2d 213, 214-15 n 2 (Tex. Crim. App 1991), confirms precisely the opposite. The CCA declined to impose a procedural default in *Baldree* on the basis of its decision in *Black v State*, 816 S W 2d 350 (Tex. Crim. App 1991), which held that the right-not-recognized doctrine excused the procedural default of Black's *Penry* claim But the CCA in *Black* plainly viewed *Penry* error as defaultable 816 S.W 2d at 364 (excusing default because of the "settled state of the case law at the time of appellant's trial"); *see also* 816 S W.2d at 367 (Campbell, J , concurring) ("In this concurrence, I present a more expansive view as to possible exceptions to the rules of procedural default under Texas law ")

Accordingly, the CCA pre-remand refusal to default LaRoyce's *Penry* claim cannot be squared with its post-remand conclusion that the lack of a contemporaneous objection requires imposition of the egregious harm standard. At a minimum, the CCA's post-remand reliance on the absence of a contemporaneous objection reflects a discretionary or inconsistent application of state procedural rules, and such capricious application of rules cannot burden the enforcement of federal rights. *See, e g , Williams v. Georgia*, 349 U.S. 375, 383 (1955) (discretionary application of state rule to bar consideration of a federal claim is not independent and adequate state ground).[16]

B. LaRoyce Adequately Preserved his *Penry* Claim Under State Law, and the CCA's Contrary Conclusion Rests on a Misapplication of Federal Law.

The CCA's belated assertion that LaRoyce failed to preserve his *Penry* claim cannot be squared with the record in this case

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[16] The CCA's imposition of its *Almanza* "egregious harm" standard on remand is capricious in a second, unrelated way The CCA originally envisioned *Almanza* to provide the standard for the consideration of unobjected-to error on *direct* review—a state analog to the federal "plain error" rule The application of the rule in habeas proceedings has been rare and erratic, with no examples prior to the instant case since the late 1980's *See Ex parte Tuan Truong*, 770 S W 2d 810 (Tex Crim. App 1989) (most recent application) Moreover, the *Almanza* standard was originally and repeatedly held to apply only to *non*-constitutional errors, and its expansion to constitutional error is likewise recent, rare, and unpredicatable *See, e g , Ladd v Texas*, 3 S W 3d 547, 564 (Tex Crim App 1999) ("Appellant's failure to object was not excused by Article 36 19 and *Almanza v Texas* because they are applicable only to violations 'which do not implicate state or federal constitutional rights '") Moreover, LaRoyce's case is the first time that the *Almanza* "egregious harm" standard has ever been applied to a *Penry* claim on state habeas *Penry* claims have long been held to be defaulted on state habeas if not properly preserved, although the CCA has overlooked the default where the claim was unavailable or futile The arbitrary and discretionary application of the *Almanza* standard separately renders the CCA's requirement of "egregious harm" an inadequate state bar to relief for LaRoyce's federal constitutional claim.

and in fact rests on a misunderstanding of federal law. From the outset of this litigation, LaRoyce has claimed that the special issues did not permit adequate consideration of his mitigating evidence. LaRoyce filed two pretrial motions to this effect. *See* JA: 7-16. LaRoyce also took the position, well-established in state law at the time of trial,[17] that the trial court lacked power to solve the *Penry* defect by altering or supplementing the legislatively-prescribed special issues. When the trial judge presented the proposed charge to the parties, he acknowledged LaRoyce's pretrial objections and made clear that he regarded them as fully before the court:

> THE COURT: The two motions to declare Texas Code of Criminal Procedure Annotated, Article 37.071, Section 3701 unconstitutional as applied, I read those and sort of read them and put them in my mind together. Is there anything not included in those motions that your wish to supplement orally?
>
> MR. MANASCO: No, Your Honor.

JA: 21.

In light of LaRoyce's written motions and the Court's oral acknowledgement of his claim under *Penry*, LaRoyce plainly preserved his claim that the special issues failed to allow adequate consideration of his mitigating evidence. The CCA nonetheless found LaRoyce's objections inadequate because he "did not object to the jury nullification instruction." 185 S.W.3d at 461; JA: 278.

The CCA's decision misunderstands the relationship between *Penry I* and *Penry II*. The crux of LaRoyce's *Penry I* claim is that his mitigating evidence could not be given mitigating effect via the special issues and, indeed, might have provided support for affirmative answers to those

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[17] *See, e.g., Stewart v. State*, 686 S.W.2d 118, 124 (Tex. Crim. App. 1984) (rejecting additional instruction in capital case because trial courts lack authority to submit special issues other than those set forth by the legislature in the death penalty statute)

inquiries. Having clearly, repeatedly, and forcefully stated that claim in a timely fashion, LaRoyce need not also have anticipated the State's (and subsequently the CCA's) flawed contention that the nullification instruction ameliorated the *Penry I* error. In short, the nullification instruction in this case did not *cause* constitutional error, it simply did not *cure* it. Thus, this Court's holding that LaRoyce's sentencing proceeding was constitutionally inadequate because the "burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented," 543 U.S. at 48, JA: 235, is responsive to precisely the constitutional defect LaRoyce identified from the outset of the trial. Accordingly, the CCA may not impose a state barrier to relief based on his purported failure to alert the trial court to the basis of his constitutional claim.

Moreover, if state law were to require more in these circumstances, where the trial court plainly understood and acknowledged the defendant's assertion that the state scheme precluded adequate consideration of his mitigation evidence, such requirements would themselves constitute impermissible barriers to the enforcement of federal law. This Court has not hesitated to reject state procedural bars to relief for federal constitutional violations when state procedural rules are inappropriately or needlessly demanding. *See, e.g., NAACP v Alabama ex rel Flowers*, 377 U S. 288, 297 (1964) (rejecting state procedural rules applied with "pointless severity"); *Staub v. City of Baxley*, 355 U S. 313 (1958) (rejecting state court finding of default based on defendant's inadequately detailed objections because to do so "would be to force resort to an arid ritual of meaningless form").

Accordingly, federal law precludes the CCA's imposition of its "egregious harm standard" based on the purported inadequacy of LaRoyce's timely objections at trial. The CCA's acknowledgement that LaRoyce "may have suffered

'some' actual harm," 185 S.W.3d at 472; JA: 298, thus compels relief for the constitutional violation identified by this Court.

CONCLUSION

The CCA's decision withholding relief in this case rests wholly upon reasoning that contradicts and is foreclosed by this Court's explicit conclusions in its summary reversal. Moreover, the CCA's refusal to grant relief depends critically on its post-remand finding of procedural irregularity that it had previously declined to embrace. Stripped of these two impermissible maneuvers, the CCA's own analysis compels the conclusion that the constitutional error found by this Court was harmful to LaRoyce Smith. This Court should therefore reverse the judgment and order the CCA to grant petitioner relief on his constitutional claim.

Respectfully submitted,

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